No. 05-805

In The
Supreme Court Of The United States

October Term, 2005

Gerald K. Washington, Acting Warden,
Sussex I State Prison,

Petitioner,

v.

William Wilton Morrisette, III

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

Respondent's Brief In Opposition

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Capital Case

Questions Presented

1. Should the Court grant certiorari to review a question of law when the necessary factual premise for that question does not exist in the case at bar?

2. Is there a compelling reason to review the Virginia Supreme Court's fact-bound decision that the defendant was prejudiced by trial counsels' deficient performance?

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The Crime and the Defendant

When Dorothy White did not show up for work on July 25, 1980, two co-workers went to her trailer to check on her. The trailer was locked, so they called Bill Anthony, who was widely known to be White's lover, to find out where she kept her spare key. When the co-workers entered the trailer, they discovered White's lifeless body on the floor. She was partially unclothed and had been stabbed eight times. There was semen in her vagina and on her outer genitalia. Although there was no evidence of anal or genital bruising or injury, the medical examiner testified that White had been raped as well as murdered. Relying on his personal assumptions about feminine hygiene practices, the medical examiner opined that White was raped because she would have cleaned her genital area immediately after coitus if the semen had been the result of consensual sex. Under Virginia law, rape elevated the homicide to capital murder.

No witness or physical evidence linked Morrisette to the crime until more than nineteen years later, when a "cold hit" on DNA from the victim's vaginal swabs was discovered to be consistent with Morrisette's DNA profile. In the long interval between 1980 and 1999, Morrisette had been convicted of burglary in 1984 and abduction and maiming in 1986. He was incarcerated for these offenses until 1994, and he reportedly was a model prisoner. He was released to parole on November 7, 1994, and he remained on parole with no infractions until February 14, 1996. From the date he was put on parole in 1994 until the date of his arrest in late 1999, he lived an unexceptionable and apparently crime-free life except for a single charge of driving under the influence, for which his permit was suspended.

At trial in August 2001, Morrisette pleaded not guilt but the jury convicted him of capital murder.[1] It subsequently sentenced him to death after finding both of Virginia's aggravating factors: that he probably would constitute a continuing serious threat to society and that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman.

The *Powell* Decision

Two months before Morrisette's trial for capital murder, the Virginia Supreme Court, sitting *en banc*, issued a unanimous, published opinion in *Powell v. Commonwealth*, 552 S.E.2d 344 (Va. 2001), in which the defendant had been convicted of capital murder and sentenced to death. A detailed understanding of *Powell* is essential to an evaluation of the questions presented in the Warden's petition for a writ of certiorari.

The state court initially announced an opinion in *Powell* in March 2001. In the first part of that opinion, the court vacated the defendant's conviction and remanded the case for a new trial on a charge no greater than degree murder, murder, which is not a capital offense. In the second part of the *Powell* opinion, the court addressed an important and recurring issue related to Virginia's statutory verdict forms for use in the penalty phase of a capital case. After careful consideration, the court held *as a matter of state law* that the statutory verdict forms do not

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[1]Morrisette averred in his verified state habeas petition, and he presented supporting evidence, that he and White also were lovers and that the sexual relations they had on the evening of July 24, 1980, were consensual. Morrisette did not admit to this relationship at the time of the crime because Bill Anthony was his boss. Anthony was a suspect in White's murder for many years; he has since died.

Morrisette presents a similar statement about the crime in *Morrisette v. Washington*, No. 05-8227, which is his cross-petition for a writ of certiorari. The Warden, in his brief in opposition to that petition, disputes some of these facts because they go beyond the testimony given at trial. Morrisette's statement of facts is based on his verified state postconviction petition and the evidence he presented in support. If there are genuine disputes as to material facts, they should be resolved in state court, not here.

adequately inform jurors they can impose a life sentence even if they find one or both aggravating factors. The court based this ruling on its determination that the statutory verdict forms were likely to cause juror confusion because they did not explicitly conform to the jury instructions. It prescribed the appropriate remedy in mandatory terms:

> Accordingly, we hold that in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life . . . when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

Id. at 363.

The Commonwealth petitioned for rehearing in *Powell*, arguing that the Virginia Supreme Court, without any intervening change in circumstances, had just "silently overruled twenty years of its own precedents" and "created an entirely new rule for verdict forms." Resp. App. 33a, 37a. In particular, the Commonwealth called attention to the state court's earlier decisions in *Mueller v. Commonwealth*, 422 S.E.2d 380 (Va. 1992), *cert. denied*, 507 U.S. 1043 (1993), and *Roach v. Commonwealth*, 468 S.E.2d 98 (Va.), *cert. denied*, 519 U.S. 951 (1996). The Commonwealth pointed out that in both of those cases, Virginia's highest court summarily held that verdict forms materially identical to those later used at Powell's trial were adequate to apprise jurors of their option to impose a life sentence even after finding an aggravating factor.[2] Resp. App. 35a-36a. The Commonwealth also charged that the *Powell* court lacked jurisdiction to "amend" the statutory verdict form and that the court had violated Virginia law by issuing an

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[2]The Commonwealth further called to the state court's attention the decisions of federal courts, including this Court's opinions in *Buchanan v. Angelone*, 522 U.S. 267, 277 (1998), and *Weeks v. Angelone*, 528 U.S. 225 (2000), in which the Court considered the rather different question of whether Virginia's statutory verdict forms were sufficient to satisfy the minimum *federal constitutional* standards of the Eighth and Fourteenth Amendments. Resp. App. 36a-37a. In these cases, the Court found no federal constitutional violation.

impermissible advisory opinion. Resp. App. 29a-32a. 41a-42a.

After thorough consideration, the Virginia Supreme Court rejected these arguments. Without recorded dissent, it declined to reconsider its decision in *Powell*. On June 8, 2001 – two months before Morrisette's trial -- the state court released the *Powell* decision in final form and designated it for publication in the Virginia Reports.[3]

Morrisette's State Postconviction Proceedings

The verdict forms used at Morrisette's trial in August 2001 were identical to the statutory forms the state's highest court had just condemned in *Powell*. No one disputes this fact. Inexplicably, Morrisette's trial attorneys did not object to the use of those verdict forms.

After Morrisette's conviction and death sentence were final, he applied for state postconviction relief and alleged that trial counsel provided ineffective assistance when they unreasonably failed to object to verdict forms that did not include the language that *Powell* said "must" be included "expressly." Both defense attorneys testified in affidavits that they were aware of the *Powell* decision at the time of Morrisette's trial and that their failure to object to the verdict forms was neither intentional nor strategic. Resp. App. 3a, 6a. To demonstrate the prevailing professional norm, Morrisette also presented evidence showing that even before the decision in *Powell*, it was common practice for Virginia attorneys in capital cases to request – and for trial courts to authorize – separate verdict forms that expressly informed jurors they could

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[3]The published opinion in *Powell* differed from the initial opinion in two very minor respects. First, the Court removed the words "decided today" from a parenthetical. Second, it changed the clause: "but receives verdict forms that expressly state that the punishment to be imposed where an aggravating factor or factors are present is death," to read "but receives verdict forms that do not expressly state that the jury is allowed to fix a sentence of life imprisonment even though one or both aggravating factors are present."

impose a life sentence even if they found an aggravating factor. Resp. App. 45a-66a. Indeed, Morrisette's own lead counsel, George Rogers, had requested, and the trial court had authorized, those precise verdict forms when Rogers represented the defendant in *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999), a case tried more than three years before Morrisette's trial. Resp. App. 46a-54a.[4]

Morrisette contended that prejudice should be presumed because counsels' deficient performance resulted in a structural error. In the alternative, he highlighted his ample mitigation evidence and argued that absent counsels' deficient performance, at least one juror would have reached a different decision on punishment.

Opposing Morrisette's application for postconviction relief, the Warden argued confusingly that *Powell* did not invalidate the statutory verdict forms or preclude their use in future cases, Resp. App. 9a; that the verdict form ruling in *Powell* was entitled to "great weight" but was nonetheless mere dictum, Resp. App. 10a; that *Powell* was inconsistent with (but did not overrule) the state court's earlier decisions, Resp. App. 12a-15a; that *Powell* was wrongly decided, Resp. App. 15a-16a; and that the *Powell* court had exceeded its authority under state law, Resp. App. 11a, 17a-18a. The Warden then asserted: "Given the still-unsettled question of the effect of *Powell*'s dicta given the Court's contrary holdings in *Roach* and *Mueller*, Morrisette cannot demonstrate that reasonable counsel would have challenged the verdict form, much less establish that any different verdict form would have been used in his case." Resp. App. 19a.

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[4]In *Atkins*, both the defense and the prosecution requested verdict forms that expressly provided for a life sentence after finding at least one aggravating factor. Respondent's appendix shows both the forms submitted by the defense, Resp. App. 46a-50a, and the forms submitted by the prosecution, Resp. App. 51a-54a.

By a divided vote, the Virginia Supreme Court granted Morrisette's application for postconviction relief, holding that trial counsels' performance in the penalty phase was deficient and that Morrisette was prejudiced. The majority also "[took] this opportunity to reaffirm our holding in *Powell*" and to state expressly that "to the extent, if any, that our holdings in *Mueller* and *Roach* are inconsistent with *Powell*, we overrule those decisions." Pet. App. 23. The dissenting justices did not address the adequacy of counsels' performance; they concluded only that Morrisette was not prejudiced by any alleged deficiency. The Virginia Supreme Court subsequently denied the Warden's petition for rehearing.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied for many reasons, most simply because this case does not implicate the questions presented and is therefore an extraordinarily inappropriate vehicle in which to resolve those questions. There is no true split of authority on the first question, even if there were, that issue would not be presented in this case for the simple reason that under the facts of *this* case, the defense attorney's Sixth Amendment obligation did not turn on his ability to anticipate any future change in the law.

Review of the petitioner's second, fact-bound question is inappropriate for much the same reasons. There is no split of authority, and even if there were, the state court in *this* case did not presume prejudice. Moreover, even if the Virginia Supreme Court applied the wrong test of prejudice, which it did not, its judgment was correct. Thus, there is no need for the Court to review any purportedly mistaken application of the correct standard.

I. Trial Counsel Did Not Have To Foresee a Change in the Law Because the Governing Legal Principles Had Been Settled by *Powell*

A. *Powell* Set Out the Governing Law at the Time of Morrisette's Trial

The *sine qua non* of the Warden's petition for a writ of certiorari is that *Powell* was dictum, and that the decisions in *Mueller* and *Roach* continued to embody the settled, governing state law until the Virginia Supreme Court expressly overruled them four years after Morrisette's trial. The Warden is mistaken on both counts. As a consequence, this case does not present the issue that the Warden wants this Court to review.

1. The Verdict Form Rule, as Announced in *Powell*, Was a Holding, Not Dictum

The Warden asserts, as if it were undisputed, that the verdict form rule in *Powell* was dictum because the Virginia Supreme Court, having determined that Paul Powell could be retried on a charge no greater than first degree murder, had no need to address a sentencing issue that could arise only at a trial for the greater offense of capital murder. What the ~~Warden's~~ simplistic analysis ignores, however, is the important and overriding fact that the state court engaged in substantial analysis and then explicitly identified its verdict form ruling in *Powell* as a holding:

> Accordingly, we **hold** that in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

Powell, 552 S.E.2d at 363 (emphasis added).

Powell was decided under state law, and the Virginia Supreme Court is the ultimate arbiter of state law. Va. Const. Art. 6, § 1. When the Virginia Supreme Court straightforwardly says in a unanimous published opinion that a portion of its opinion is a holding, it is a holding for

purposes of Virginia jurisprudence, not dictum.[5] Even if a jurist or legal practitioner at the time might have questioned whether it was appropriate for the state's highest court to identify *Powell*'s verdict form ruling as a holding, the Virginia Supreme Court clearly *chose* to designate its decision on this issue as a holding, and that court has the final word on such matters. In *Powell*, it expressly declared that as a matter of state law, this part of its decision was a holding.

As an explicitly stated holding, this portion of the *Powell* decision carries the same precedential weight and has the same binding authority as the holding in any other case that the state's highest court announces in a reported opinion. As of June 8, 2001, when the Virginia Supreme Court issued is final opinion in *Powell*, the law was settled that in Virginia capital cases, courts must give the sentencing jury verdict forms providing expressly for imposition of a life sentence after finding one or both aggravating factors. That is the settled state law that Morrisette's trial attorneys unreasonably failed to enforce.

2. The Verdict Form Rule in *Powell* Was a Mandatory Directive to Virginia's Inferior Courts

Entirely independent of its adjudication of the rights of the parties, the court in *Powell* issued a mandatory directive, addressed to the state's inferior courts, which set forth procedural

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[5]It is not uncommon for a state court to create a holding merely by saying that its decision on a particular question is a holding. In *State Farm Fire & Casualty Company v. Morua*, 979 S.W.2d 616 (Tex. 1998), for example, the issue was whether a state rule of procedure required that supplemental interrogatory answers be verified. The state's highest court held that Morua had waived that issue because his objection to the unverified answer was untimely. *Id.* at 620. The court then went on to hold that answers to supplemental interrogatories must be verified. *Id.* at 621 ("we **hold** that supplemental interrogatory responses must be verified") (emphasis added). Having already determined that the issue was waived, the court's discussion of the verification requirement was unnecessary to its decision. Nonetheless, because the state's highest court designated this as a holding, Texas jurists without reservation consider it a holding. *See, e.g., Pinechase Investments v. Antonini*, 1999 WL 144786 at *2 (Tex. App. March 18, 1999).

safeguards those courts must afford in the penalty phase of future capital cases:

> Accordingly, we hold that in a capital murder trial, **the trial court must** give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

Powell, 552 S.E.2d at 363 (emphasis added). This also was a determination based on state law.

The timing of this directive was no accident. Concerns about the statutory verdict forms had been percolating in state courts even after the decisions in *Mueller* and *Roach*. The Virginia Supreme Court considered itself unable to address the issue prior to *Powell* because the defendants who raised the issue in earlier cases did not properly preserve it for appeal. *See Powell*, 552 S.E.2d at 361, 363. Because *Powell* was the first post-*Roach* case in which this important issue was both briefed and fully preserved, the state court immediately took the opportunity to settle the question and to issue a directive to the state's inferior courts setting out the procedures they must use in future capital cases.

A mandatory directive from the state's highest court to its inferior courts is binding on the state's lower courts independent of any rights the high court may adjudicate with respect to the individual litigants. When the Virginia Supreme Court instructs the trial courts that they "must" do X, those courts must do X. When the court sets out its directive in a published opinion, it informs the bar as well as the bench that the trial courts must do X.

The mandatory directive issued in *Powell* changed the law. As of June 8, 2001, all trial courts in the Commonwealth were on notice that in the penalty phase of a capital case, they must give the jury verdict forms providing expressly for imposition of a life sentence after finding one or both aggravating factors. The directive similarly put criminal defense attorneys on notice that

they were entitled to such verdict forms, that they should request such forms, and that the trial courts were obligated to use those forms. No attorney had to foresee some future change in the law in order to understand and apply the *Powell* mandate.

3. *Powell* Overruled the Decisions in *Mueller* and *Roach*

Again as if it were undisputed, the Warden asserts that the Virginia Supreme Court did not overrule *Mueller* and *Roach* until 2005, when it expressly did so in the postconviction opinion in Morrisette's own case. The reason, according to the Warden, is because the state court did not even mention *Mueller* or *Roach* and did not expressly say it was overruling those decisions. The Warden is wrong on both the facts and the law. First, the *Powell* opinion explicitly recognized the Commonwealth's contention that, under *Roach*, use of the statutory verdict forms could not be reversible error. "The Commonwealth further contends that because we have held that the sentencing verdict forms prescribed by Code § 19.2- 264.4(D) are not unconstitutionally vague, the trial court has the discretion to reject a defendant's request for an alternative form. *See Roach v. Commonwealth*." *Powell*, 552 S.E.2d at 362. Second, even if *Powell* had not mentioned *Roach* at all, the law is clearly established that the Virginia Supreme Court overruled *Mueller* and *Roach* in 2001 when it issued its final decision in *Powell*.

In *Wingate v. Coombs*, 379 S.E.2d 304 (Va. 1989), the court made clear that under Virginia law, a later case overrules an earlier, contradictory one even if it does not specifically identify the cases being overruled or make an express statement that it is overruling those decisions. The relevant circumstances in *Wingate* were identical to those in *Morrisette*. The Virginia Supreme Court had issued two decisions (*Henderson v. Hudson*, 15 Va. (1 Munf.) 510 (1810), and *Walker v. Herring*, 62 Va. (21 Gratt.) 678 (1872)) setting out a rule of state law, and

some years later it issued another decision (*Miller v. Ferguson*, 57 S.E. 649 (Va. 1907)) stating the contradictory rule of law. When the issue came up again in *Wingate*, the defendants made precisely the same assertions the Warden now makes in his petition for a writ of certiorari: that *Henderson/Walker* remained the governing law and that the *Miller* decision, although contradictory, did not overrule *Henderson/Walker* because it did not mention those cases and did not expressly say it was overruling them:

> Defendants state that the facts of the present case, and of *Henderson* and *Miller*, are virtually identical. They correctly point out that neither *Henderson* nor *Walker*, which applied the *Henderson* rule, has been expressly overruled. They also accurately observe that the opinion in *Miller* fails to mention either *Henderson* or *Walker*. Thus, defendants say, the *Miller* decision was contrary to established law, was wrongly decided, and should not be considered binding precedent by this Court.

Wingate, 379 S.E.2d at 305. The Virginia Supreme Court squarely rejected this argument, concluding as a matter of state law that *Miller* had, in fact, overruled *Henderson/Walker*:

> This bit of history clearly demonstrates, and we hold, that the *Miller* Court overruled, *sub silentio*, both *Henderson* and *Walker* insofar as those decisions conflicted with the rule announced in *Miller*. Obviously, the *Miller* Court was acutely aware of the two earlier decisions. Not only were they relied upon on brief, but the very ruling [of the trial court] under review discussed the cases. We will not speculate why the Court chose not to mention the earlier authority. Nevertheless, it is clear that the Court determined not to follow the earlier rule and decided to adopt the majority view, which became the law of Virginia on the subject.

Wingate, 379 S.E.2d at 307.[6] Explaining that the authoritative governing law from the date of the

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[6]The Virginia Supreme Court similarly was "obviously . . . acutely aware" of the decisions in *Mueller/Roach* when it issued its final opinion in *Powell*. The *Powell* opinion explicitly referred to *Roach*, which was at that time the court's most recent decision on verdict forms in capital cases. Moreover, both *Mueller* and *Roach* were comparatively recent decisions. Justice Keenan, who authored the opinions in both *Mueller* and *Roach*, was a member of the court in *Powell* and she fully joined the *Powell* opinion. In fact, six of the seven justices who participated in the unanimous decision in *Powell* had previously participated in the unanimous

Miller decision forward had been the rule announced in *Miller*, and therefore that *Miller* was the governing law at the time of the *Wingate* trial, the Virginia Supreme Court held that the trial court in *Wingate* had erred when it based its decision on *Henderson Walker* rather than on the more recent authority of *Miller*. It then "appl[ied] the doctrine of *stare decisis*," "reaffirm[ed] the rule in *Miller*," and reversed the trial court's decision. *Id.*

Wingate made clear the controlling principle of state law if it had not been clear earlier: When a published decision issued by the Virginia Supreme Court contradicts the decision in an earlier published case of that same court, the later-in-time decision overrules the earlier one. The overruling is explicit if the court chooses to say so; the overruling is *sub silentio* – yet no less authoritative – if the court remains silent.

The principle that later-in-time decisions overrule prior decisions that are directly inconsistent is so well established in the law, and its application to the verdict form issue in *Powell* is so obvious, that no competent criminal defense attorney after *Powell* could have thought the *Mueller* and *Roach* decisions still stated the settled, governing law. To the extent *Powell* was directly inconsistent with *Mueller/Roach*, *Powell* controlled. Morrisette's attorneys did not have to be clairvoyant to recognize that *Powell* stated the clear, governing legal principle, and that *Mueller* and *Roach* were no longer good law with respect to the verdict forms that courts *must* use in the penalty phase of a capital trial.

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decisions in *Mueller* and/or *Roach*. In addition, the Commonwealth explicitly discussed *Mueller/Roach* in its petition for rehearing in *Powell*, thus providing further assurance that the state court was aware of its prior decisions before it issued its final decision in *Powell*. Although *Powell*, like *Miller*, did not expressly overrule the prior inconsistent decisions, the Virginia Supreme Court obviously was aware of those decisions, determined not to follow that precedent, and decided to adopt a different rule.

4. Virginia Practice Confirms that Lawyers and Judges Have Uniformly Viewed *Powell*, Rather than *Mueller and Roach*, as the Authoritative Governing Law Since 2001.

If anyone could have thought, after June 8, 2001, that the law regarding verdict forms in Virginia capital cases was still governed by *Mueller Roach*, one would expect to see evidence of this in the Commonwealth's courthouses. Morrisette has located none. Trial judges certainly have understood since 2001 that they "must" use the verdict forms mandated by *Powell*. Save for Morrisette, every Virginia defendant sentenced to death by a jury since June 8, 2001, has had the benefit of the verdict forms mandated by *Powell*.[7]

The verdict forms approved in *Powell* are more favorable to the defense than the statutory verdict forms. As a consequence, one would expect prosecutors to prefer the statutory verdict forms and to request those forms if they believed they were entitled (or even permitted) to have jurors use the statutory verdict forms. Yet Morrisette has identified no capital case tried after June 8, 2001 – except for his own – in which the prosecutor even *asked* the trial court to use the statutory verdict forms rather than the verdict forms that *Powell* said courts must use.[8]

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[7]*See Emmett v. Commonwealth*, No. 020314 (JA 66-67); *Green v. Commonwealth*, No. 020757 (JA 297-301); *Jackson (Kent) v. Commonwealth*, No. 030749 (JA 1417-18); *Johnson v. Commonwealth*, No. 031306 (JA 1388-89); *Jackson (Jerry) v. Commonwealth*, No. 031517 (JA 884-89); *Elliott v. Commonwealth*, No. 031610 (JA 2061-63); *Winston v. Commonwealth*, No. 040686 (JA 3043-44); *Muhammad v. Commonwealth*, No. 041050 (JA 2074-83). In *Powell v. Commonwealth*, No. 031421, the trial record does not permit a determination of the verdict forms used, but one can presume with confidence that the trial court on remand complied with the Virginia Supreme Court's earlier decision in that very case. In *Wolfe v. Commonwealth*, No. 021872, the trial record also does not permit a determination of the verdict forms used, but the Warden has taken the position in state and federal collateral proceedings that the trial court used verdict forms consistent with those approved in *Powell*.

[8]Morrisette acknowledges that he does not have complete information about the activities of Virginia prosecutors in capital cases that did not result in a death sentence. In the unlikely event that any prosecutors in those cases asked the court to use the statutory verdict forms after

In light of this uniform state practice, it appears that the only lawyers in Virginia who think *Powell* did not authoritatively change the governing law for verdict forms in June 2001 are the lawyers who represent the Warden.

B. The Virginia Supreme Court Faithfully Applied This Court's Clearly Established Standards for Examining Counsels' Conduct

Even if this case presented an appropriate factual context for the legal question the Warden asks the Court to review, and it does not, the Court should deny certiorari because the standard for evaluating defense counsels' performance was firmly established in *Strickland v. Washington*, 466 U.S. 668 (1984), and the Virginia Supreme Court faithfully adhered to that standard in Morrisette's case.

Contrary to the inflexible rules that the Warden wrongly ascribes to lower courts on both sides of the purported division of judicial authority, nearly all of the cited cases show nothing more than the application of relatively settled Sixth Amendment law to factually diverse circumstances that "'of necessity require[] a case-by-case examination.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring)). It is not surprising that such examinations will lead in some instances, perhaps many instances, to the conclusion that counsels' performance was constitutionally adequate, and in other instances to the conclusion that it was not. A mere difference in result does not demonstrate a split of authority regarding the governing legal principle or its proper application.[9]

June 8, 2001, their numbers are undoubtedly very small.

[9]At most, only two of the cases the Warden cites were decided under a bright line rule that counsel *never* can be ineffective in failing to anticipate a change in the law, regardless of the facts in the individual case and regardless of the prevailing state of the law; the remaining cases make passing statements but ultimately consider the circumstances. In *Kornahrens v. Evatt*, 66

Nor, under *Strickland*, could courts properly endorse a one-size-fits-all rule that says counsels' failure to anticipate a change in the law never (or always) falls below the threshold established by the Sixth Amendment. *Strickland* does not permit courts to "establish mechanical rules," *id.* at 696, or "form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. If the law is unsettled, *Strickland* requires the reviewing court to determine whether counsels' failure to foresee a particular change in the law (or to anticipate the reasonable probability that the law will change) was objectively reasonable under the circumstances. It may "often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding." *Smith v. Murray*, 477 U.S. 527, 536 (1986). Yet there also will be cases where, considering all the facts and circumstances, it is unreasonable for counsel *not* to anticipate such reconsideration. The reviewing court's role is to distinguish these cases on an individual basis, not to dispose of them by applying a blanket rule.[10]

F.3d 1350 (4th Cir. 1995), *cert. denied*, 517 U.S. 1171 (1996), the petitioner alleged that trial counsel in a capital case rendered ineffective assistance because he failed to make a *proffer* of mitigating evidence where admission of that category of mitigating evidence was prohibited by settled South Carolina law. At the time of trial, this Court already had granted certiorari to determine the constitutionality of South Carolina's restriction, trial counsel was fully aware of the grant of certiorari, trial counsel knew that a favorable ruling from this Court could be beneficial to his client, and state law provided that counsel would forfeit this potential benefit if he did not make the proffer. Contrary to the teaching of *Strickland*, the Fourth Circuit did not consider whether, under the circumstances, it was objectively reasonable for counsel to fail to make the proffer. Instead, it denied habeas relief by relying solely on a *per se* rule that counsel could not be ineffective for failing to anticipate the change in state evidentiary law. *Id.* at 1360. *See also Brown v. United States*, 311 F.3d 875, 878 n.5 (8th Cir. 2002).

[10]This Court has emphasized repeatedly that the proper measure of attorney performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Wiggins v.*

The Virginia Supreme Court concluded that under the circumstances of this case, it was objectively unreasonable for Morrisette's trial attorneys not to request the verdict forms that *Powell* said trial courts must use. This decision was correct under *Strickland* even if *Powell* was dictum and *Mueller Roach* were still good law in 2001. The facts and circumstances establishing the unreasonableness of trial counsels' conduct, viewed from counsels' perspective in August 2001, included the following:

- Counsel were fully aware of the *Powell* decision at the time of Morrisette's trial, and their failure to request the kind of verdict forms that *Powell* approved was not intentional or part of any trial strategy.

- The *Powell* opinion expressed the thoughts of all seven justices on the Virginia Supreme Court. It was a uniquely powerful indicator not only of their abstract view of the law, but also the likelihood they would rule in Morrisette's favor if counsel objected to the statutory verdict form, just as Paul Powell did, and the issue came up on direct appeal.

- Six of the justices who participated in the *Powell* decision were acutely aware of the decisions in *Mueller* and *Roach* because they had participated in one or both of them. This suggested that they had confronted the conflict between their rulings in *Powell* and *Mueller/Roach* and had resolved the conflict in favor of the rule they stated in *Powell*.

- The verdict form ruling in *Powell* was issued after briefing, argument, and full consideration. It was, as the Warden later conceded, entitled to "great weight" under the

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Smith, 539 U.S. 510, 521 (2003); *Rompilla v. Beard*, 125 S.Ct. 2456, 2462 (2005). It is notable, therefore, that the American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), recognizes that counsel in a capital case "must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as *anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment*. Guideline 1.1 & accompanying Commentary, at 4 (emphases added).

The *Guidelines* reflect the fact that lawyers are supposed to be zealous advocates for their clients, arguing disputable, potentially winnable points in their clients' favor. The verdict forms approved in *Powell* were unequivocally more favorable to capital defendants than the statutory verdict forms the state court previously upheld in *Mueller* and *Roach*. As a result, a criminal defense attorney who, without strategic basis, failed to advocate for the advantageous verdict forms described in *Powell*, and who instead acquiesced without objection to the disadvantageous forms described in *Mueller Roach*, would perform below the norms of the profession.

rule in *Anable v. Commonwealth*, 65 Va. (25 Gratt.) 563, 1873 WL 5161 (Va. Dec. 10, 1873), because it was at least judicial dictum rather than mere *obiter dictum*.[11]

- Morrisette's lead attorney had requested *Powell*-type verdict forms three years earlier in *Atkins*. Indeed, the prosecutor in *Atkins* also asked for *Powell*-type verdict forms in that case and the trial judge used them. As a result, Morrisette's counsel not only had reason to expect the judge in Morrisette's case would agree to use these same verdict forms, but also could demonstrate that a judge in the adjacent jurisdiction had approved their use.

These facts and circumstances leave no doubt that even if a court accepted the Warden's inaccurate characterizations of *Powell* and *Mueller-Roach*, it would hold under *Strickland* that counsels' failure to object to the statutory verdict forms was objectively unreasonable under the circumstances. There is no need for the Court to grant certiorari to review a decision that conformed to *Strickland*'s teaching and resulted in the correct judgment.

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[11]Although the Warden does not distinguish between gradations of dicta, the ruling in *Powell* was, at the very least, judicial dictum rather than *obiter dictum*:

> A mere *obiter dictum* is not a binding authority, because it is generally a casual remark, dropped in the course of a judicial opinion, in reference only to the case before the court, and without considering its general meaning and operation. But when it appears to have been proper that the court should express its opinion upon a question arising incidentally before it, and for the purpose of settling the practice in cases like the one before it, certainly it was the duty of the court to consider the question very carefully, and the presumption is that it did so. Such an expression of opinion is entitled to great weight, and comes nearly up to the degree of a binding authority.

Anable, 1873 WL 5161 at *8. Although *Anable* did not use the words "judicial dicta," that is the term that commonly identifies "conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial dictum may have great weight." *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.37 (3d Cir. 1980). *See* Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 713 (1999) (describing judicial dicta as "those statements of the court which, while not part of the holding, are nevertheless set forth with the deliberate intent of not merely exploring the legal issue but instructing the bench and bar"); *see also* Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L.J. 139, 160 (2003); Comment, *Dictum Revisited*, 4 Stan. L. Rev. 509, 513 (1952).

II. The Question of Prejudice Presents No Compelling Issue of Federal Law

The Warden also asks this Court to review the Virginia Supreme Court's determination that Morrisette was prejudiced by his attorneys' deficient performance. The state court accurately stated the *Strickland* test of prejudice. Pet. App. 25. and the Warden's proposed question regarding prejudice amounts to nothing more than an assertion that the state court misapplied that test in an individual case. This is not a compelling reason for the Court to grant review. Moreover. even if the state court had been mistaken in its application of the proper standard. its judgment was nonetheless correct.

A. The State Court Did Not Presume that Morrisette Was Prejudiced

The Virginia Supreme Court explicitly rejected Morrisette's argument that counsels' deficient performance should be exempt from a prejudice analysis. Pet. App. 24 n.10. Lacking any express declaration that the state court presumed prejudice, the Warden simply infers from the "perfunctory" nature of the state court's analysis that it must have jettisoned the *Strickland* test of prejudice, which it had just recited, and instead presumed prejudice. That inference is unwarranted and certainly is not supported by anything in the text of the court's opinion. Indeed, even the dissenting judges did not intimate that the court had presumed prejudice.[12]

The opinion in *Emmett v. Warden*. 609 S.E.2d 602 (Va. 2005), and the court's discussion of that case in *Morrisette*. Pet. App. 25 n.11. soundly refute the Warden's suggestion that the Virginia Supreme Court presumes prejudice when counsel fails to object to a defect in the

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[12]The distinction between the majority and the dissent is that the majority, accepting *Powell*'s premise that the jury was likely to be confused by a conflict between the instructions and the verdict forms. asked whether there was a reasonable probability of a different result from a jury that was not confused about its sentencing options. The dissent. by contrast. simply disagreed with *Powell*'s premise that jurors could be confused in the first instance.

penalty-phase verdict forms. In *Emmett*, the trial court failed to give the jury a verdict form on which they could indicate that they found no aggravating factor. The state's highest court agreed that counsels' failure to object rendered their performance deficient under the Sixth Amendment, but it concluded that Emmett was not prejudiced under the specific circumstances of that case. Because the decisions in cases like *Emmett* and *Jackson v. Washington*, 619 S.E.2d 92 (Va. 2005), clearly show that the Virginia Supreme Court understands and ordinarily applies the correct test of prejudice under *Strickland*, these cases also demonstrate that the error in *Morrisette*, if any, was case-specific and therefore not appropriate for certiorari review.[13]

B. The State Court's Judgment Was Correct

If Morrisette's defense counsel had cited *Powell* and objected to the statutory verdict forms, the trial court unquestionably would have used the verdict forms mandated by that case for the reasons stated previously. Because those verdict forms reduce the likelihood of confusion, there is a reasonable probability that if the jury had been given the verdict forms

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[13]The Warden asserts that there is a split of authority on the question of presumed prejudice. The split is illusory. Although Justice Thomas identified three cases in which he thought the Sixth Circuit's explicit presumption of prejudice was "dubious" or "questionable," *Bell v. Quintero*, No. 04-386, slip op. at 7, 8 (Mar. 21, 2005) (Thomas, J., dissenting from denial of certiorari), the issue in each case was not the governing legal principle but a difference of opinion as to whether the facts in each case rose to the level required for a presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984). The Second Circuit case cited by the Warden similarly is not at odds with the rule in other circuits. *Bloomer v. United States*, 162 F.3d 187 (2nd Cir. 1998), concerned trial counsel's failure to object to a clearly erroneous instruction on reasonable doubt – an error which, as the Court held in *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993), is structural and defies harmless error review. The Second Circuit merely applied the rule, generally accepted in other circuits, that when trial counsel's deficient performance results in structural error, prejudice is presumed. *See, e.g., McGurk v. Stenberg*, 163 F.3d 470, 473 (8th Cir. 1998); *Miller v. Dormire*, 310 F.3d 600, 603-04 (8th Cir. 2002); *Miller v. Webb*, 385 F.3d 666, 676 (6th Cir. 2004); *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 165, 180 (4th Cir. 2000) (en banc), *cert. denied*, 534 U.S. 830 (2001).

approved in *Powell*, at least one juror would have understood and exercised her right to hold out for a life sentence.

The powerful mitigating evidence that was before the jury demonstrates that Morrisette was a good candidate for a life sentence, and that there is a reasonable probability the jury would have reached a different result. First, Morrisette had a remarkable record of good behavior both in prison and after release. He was a model inmate during the long period of his previous incarceration, and again after he was arrested for Dorothy White's murder.[14] He committed no infractions during the 15 months when he was on parole release after serving that prison term. Most extraordinarily, he continued to live an essentially crime-free life in open society (except for one charge of driving under the influence) from the day he completed parole until the day he was arrested for White's murder – a total post-incarceration interval of more than four years. Second, Morrisette had positive personal qualities. For example, he not only had served two patriotic tours in the Vietnam war, but also had been decorated for that service. His attainment of maturity – he was 54 years old by the time of trial – also was a positive personal quality because in common experience, people at that age are substantially less likely to engage in acts of violence than those who are 20 or 30 years younger. Third, there was evidence of diminished moral culpability stemming from Morrisette's problems with alcohol. Fourth, Morrisette had a loving family who cared deeply about him. Fifth, there were at least two unusual circumstances relating to the trial that provided jurors good reason to be lenient or merciful and to impose a life sentence. One reason was the jurors' recognition that the 21-year delay between crime and trial

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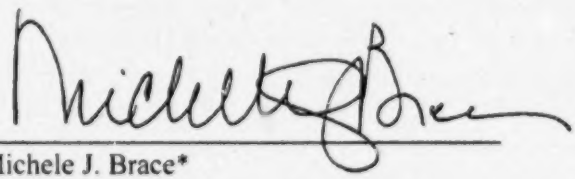
[14]At Morrisette's trial, the jailer testified that Morrisette was "a model prisoner" who was never aggressive and never caused a problem, and that the jailer wished more of his prisoners were like Morrisette.

had prejudiced Morrisette's ability to mount a defense.[15] The other reason, which related to the degree of the homicide, was the questionable foundation for the medical examiner's determination that White had been raped. In light of this considerable mitigating evidence and the reasons for showing leniency or mercy, there is a reasonable probability that at least one juror would have voted for a life sentence if she had received the verdict forms mandated by *Powell*, had clearly understood her sentencing options, and had had an unambiguous mechanism for imposing a life sentence even after finding an aggravating factor.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted



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Date: January 26, 2006

[15]The trial court made a factual finding that Morrisette "had probably experienced some actual prejudice because of the death of witnesses since White's murder," and the Virginia Supreme Court agreed with this conclusion on direct appeal. Pet. App. 40.

No. 05-805

In The
Supreme Court Of The United States

October Term, 2005

Gerald K. Washington, Acting Warden,
Sussex I State Prison,
Petitioner,

v.

William Wilton Morrisette, III,
Respondent.

Certificate of Service

I hereby certify that I am a member of the Bar of this Court; that I am counsel for William Morrisette; and that on January 26, 2006, I caused the foregoing Respondent's Brief in Opposition to be served by electronic mail and by first-class mail on Katherine P. Baldwin, Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, telephone (804) 786-2071.

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No. 05-805

In The Supreme Court of the United States

GERALD K. WASHINGTON,
ACTING WARDEN, Sussex I State Prison,

Petitioner,

v.

WILLIAM WILTON MORRISETTE, III,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONER'S REPLY

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does defense counsel perform ineffectively under the Sixth Amendment if, at the time of trial, he failed to foresee changes to settled state law which the appellate court would make in the future?

2. May a court reviewing a claim of ineffective assistance of counsel presume prejudice from counsel's failure to foresee changes to settled state law which the appellate court would make in the future?

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PETITIONER'S REPLY ARGUMENT

Nothing in the brief in opposition casts doubt on the need for this Court to grant review and reverse the judgment of the Virginia Supreme Court. The respondent does not seriously dispute that the lower court's judgment conflicts with the decisions of various federal circuits, state supreme courts and this Court. His attempt to deflect attention away from the questions presented by discussion of the precedential value of an advisory opinion of the Virginia Supreme Court on lower state courts is wholly misplaced.

1. Trial Counsel's Prior Representation Of Atkins Proves He Cannot Have Acted Ineffectively In Morrisette's Trial.

Morrisette relies on the fact that one of his trial counsel previously had represented Daryl Atkins in two capital murder trials in which the trial court utilized non-statutory verdict forms. That fact only demonstrates why a reasonably competent counsel would elect in the future, as Atkins' counsel did when he subsequently represented Morrisette, to use the statutory verdict form. In Atkins' first trial, the Virginia Supreme Court vacated the death sentence on direct appeal because the trial court inadvertently *omitted* part of the statutory verdict form offered by the defense. *Atkins v. Commonwealth*, 510 S.E.2d 445, 456 (1999). *Atkins* contained no criticism of the statutory verdict form. A reasonably competent defense attorney, especially one who had experienced the state court's views on the matter in his own case, quite properly would believe that the statutory verdict form was a safe bet.

Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001), issued shortly before Morrisette's trial, criticized the verdict form in Powell's case in an advisory opinion, but did not even recite the language it was criticizing or provide the language preferred by the court. *Powell*, 552 S.E.2d at 361-63. Without knowing the language being

criticized, an attorney reading the opinion would be able to rely only upon the decision itself. That advisory opinion made only one point with any clarity: Powell's verdict form did not give the jury the option of imposing a fine along with a life sentence, *as the statutes allowed*. *Powell*, 552 S.E.2d at 362-63.

What followed that point, however, was anything but clear. In the next four short paragraphs, the court stated that Powell had made a request to include language in his verdict forms providing for a life sentence if aggravating factors were found, but did not state what words Powell requested. The court stated that, in *Atkins*, unlike in Powell's case, the jury was provided with forms allowing for a life sentence if aggravators were found. *Powell*, 552 S.E.2d at 363. But how were the forms used in Powell's case different from the ones used in Atkins' case? The court's generalized, even ambiguous, language does not answer that question with any certainty.

Morrisette's counsel knew from personal experience that the forms used in Atkins were deficient because they did *not* contain the statutory verdict-form language. And he certainly knew from precedent which pre-existed *Atkins*, *Powell* and Morrisette's case that the Virginia Supreme Court always had rejected arguments that the statutory form did not allow the jury both to return a life sentence and find aggravating factors. *See Mueller v. Commonwealth*, 422 S.E.2d 380, 396-97 (Va. 1992); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 (Va. 1996).[1] Using hindsight, with the advantage of the state court's detailed analysis in *Morrisette v. Warden*, 613 S.E.2d 551 (Va. 2005), it has become clear what the court in *Powell* found unwise about the statutory verdict form: its language, "and having considered all of the evidence in aggravation

[1] The Virginia Supreme Court admitted in *Morrisette v. Warden* that this precise argument had been raised and rejected in *Mueller* and *Roach*. (Pet. App. at 19-21).

and mitigation of such offense, fix his punishment at imprisonment for life" (Pet. App. 55), does not also state, "and having found an aggravating factor."

At the time of Morrisette's trial, not only had that explication not yet been made, but the *omission* of the same language later found objectionable in the decision below actually had caused *reversal* in *Atkins*, the case known personally to Morrisette's counsel. The Virginia Supreme Court's decision to lay fault at counsel's feet for not seeing into the future simply cannot be squared with *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (distorting effects of hindsight must be eliminated). Its decision to join other jurisdictions where the *Strickland* standard is being weakened compels the grant of certiorari.

2. Morrisette's Jury Cannot Have Been Confused.

Morrisette's argument regarding the petitioner's second question – whether a court may presume prejudice on an ineffective assistance claim involving a claimed error of state law – only makes the case for a grant of certiorari. Under *Strickland*, the alleged error by counsel – here the failure to object to the statutory verdict form – actually must have prejudiced the defense. 466 U.S. at 694. Morrisette thus was required to demonstrate that, but for the failure to object, there is a reasonable probability that "the result of the proceeding would have been different." *Id.*

The Virginia Supreme Court, however, automatically assumed prejudice when it concluded summarily that a jury is "likely to be confused" when it is not given a verdict form with an additional paragraph "expressly stating" that it could select a life sentence along with an aggravating factor. (Pet. App. 24). Without any showing by Morrisette of a reasonable probability that such confusion happened in his case, or any discussion by the court of it happening in Morrisette's case, the court found "implicit confusion" and, based on that implied circumstance alone, a reasonable probability that the jury would not have imposed a

death sentence if it had not been given the statutory verdict form. Morrisette does not deny that the court found prejudice based on an alleged error by counsel which "might" cause jury confusion without the required demonstration under *Strickland* that the alleged error probably did result in juror confusion in his case such that it caused the jury to reject a life sentence it otherwise would have imposed.

Morrisette's jury could not have been confused. It specifically was instructed that, if it found an aggravating circumstance, it must decide whether to "reduce" the "punishment" after considering all mitigation factors. (Pet. App. 56). Morrisette and the Virginia Supreme Court ignore this specific instruction. His jury also specifically was instructed in the identical manner as Douglas Buchanan's jury had been instructed, an instruction which this Court found to direct the jury it may return a life sentence even if it finds an aggravating circumstance. *See Buchanan v Angelone*, 522 U.S. 269, 277 n.4 (1998).[2] Morrisette's jury was given the statutory verdict form which expressly told the jury it could find an aggravating circumstance and sentence him to death or sentence him to life after considering all aggravating and mitigating evidence. (Pet. App. 54-55).

Morrisette says he presented compelling mitigating evidence and thus was "a good candidate" for a life sentence. He does not explain how such alleged facts, even if true, meant that his jury was confused, and certainly not to the extent that it imposed a death sentence out of a mistaken belief it had no option to sentence him to life. He says he was a model prisoner, decorated veteran, too old to be dangerous anymore, had an alcohol problem, a loving family, unfairly was tried 21 years after the crime and the

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[2] The only difference between Morrisette's and Buchanan's instructions was that Morrisette's instruction additionally directed the jury that it could impose a fine along with a life sentence.

evidence of rape was insufficient. (BIO at 20). The evidence the jury heard and saw, however, established that Morrisette was a vicious killer who, in addition to the horrendous assault and stabbing murder of Ms. White, had abducted, maimed and burgled others. In one case, Morrisette violently attacked his female victim in the same manner as Ms. White, but she luckily escaped death due to passers-by. (Pet. App. 38-39). Morrisette's contentions regarding unfairness from delay and the sufficiency of rape were rejected on direct appeal (Pet. App. 39-43, 46-47); neither contention would have been allowed as grounds to consider during a penalty phase in Virginia. *See Johnson v. Commonwealth*, 591 S.E.2d 47, 57 (Va. 2004) (challenges to guilt not admissible in sentencing phase), *rev'd on other grounds*, 125 S.Ct. 1589 (2005).

The jury found Morrisette to be both a "future danger" to society and his crime to have been "vile" in that it involved torture, aggravated battery or depravity of mind. It selected a death sentence. There is no evidence ever shown from which a court could conclude the jury was confused or misled into thinking it could not impose a life sentence. The Virginia Supreme Court did not address the effect of instructions and verdict forms on Morrisette's actual case; rather, it found prejudice in the abstract from the error it perceived in the verdict form. That presumption of prejudice is impermissible under the Sixth Amendment. The lower court's application of the wrong standard conflicts with the majority of other lower courts and follows a number of recent jurisdictions which have decided to weaken the strong standard enunciated in *Strickland* for providing relief on collateral review.

3. The "One-Juror" Argument Is Contrary To *Strickland*.

Morrisette argues that, if his jury had been given a proper verdict form, "at least one juror" would have held out for a life sentence. (BIO at 19-20). The Court should

not be misled by the superficial logic of this assertion. In *Strickland*, this Court made clear that the prejudice inquiry "must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 446 U.S. at 695.

> The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Id. Indeed, "the actual process of decision . . . should not be considered in the prejudice determination." To say, as Morrisette has, that a single juror may have voted for life, is, while potentially *factually* possible, not *legally* cognizable. *Strickland* requires a "reasonable person" objective test when it comes to prejudice. Is there a reasonable probability of a different result that the *jury*, not one *juror*, would have voted differently had it been given a different verdict form? The "single juror" test would, essentially, eviscerate *Strickland's* prejudice test because a court always can say it is possible, even probable, that there is a single juror somewhere who may have voted differently. The "reasonable probability" test obviously requires more.

4. The *Powell* Advisory Opinion Cannot Establish Ineffective Assistance.

Morrisette's brief in opposition is devoted almost exclusively to proving that *Powell* must have had binding effect on the lower courts at the time Morrisette was tried. The petitioner does not dispute that all published decisions of the Virginia Supreme Court bind the Virginia lower courts. The issue Morrisette fails to confront head-on, however, is whether the language in that advisory opinion would have put a reasonably competent defense attorney on notice of the highly-specific, detailed directive about verdict forms which the Virginia Supreme Court later explicated in *Morrisette v. Warden* such that a court

could conclude with any measure of confidence that the attorney's performance was so greatly deficient as to constitute a Sixth Amendment violation. The answer to that question must be "no."

Morrisette admits that the verdict-form language in *Powell* was an advisory opinion not relating to the holding of the case (which reversed Powell's conviction for an improperly amended indictment). (BIO at 2). He acknowledges that, at the time that advisory opinion was published, other recent, pre-existing opinions from the Virginia Supreme Court – endorsing in *non-advisory holdings* the very same statutory verdict form used in Morrisette's case – were not overruled expressly until the state court did so in *Morrisette v. Warden*. (BIO at 10). He does not dispute the Virginia Supreme Court's acknowledgment in *Morrisette v. Warden* that the statutory verdict form – the one used in Morrisette's trial – was re-enacted without significant change by the Virginia General Assembly *after the* ***Powell*** *advisory opinion criticizing the statutory verdict form had been published*. (Pet. App. 13, note 4).[3]

Instead of addressing the obvious implications of these significant, undisputed facts as they relate to trial counsel's knowledge at the time of Morrisette's trial and counsel's consequent lack of objection to the statutory verdict form, Morrisette tries to prove that *Powell* actually overruled those pre-existing precedents without doing so expressly; indeed, without even discussing them. Morrisette relies on an inapplicable 1989 Virginia Supreme Court case relating to the statute of frauds and partnership agreements which held that, in 1910, the court had overruled *sub silentio* a case from 1810. (BIO at 10). He contends that, just as in the frauds case, the Virginia

[3] The only change the Virginia legislature made to the statutory verdict form after *Powell* was to add the option of imposing a fine along with a life sentence.

Supreme Court in *Powell* must have overruled its prior precedents *sub silentio* because the parties argued those prior precedents in their briefs and because the court's membership, which largely was the same as when the prior precedents had been decided, must have known it was ruling in *Powell* contrary to those prior precedents. The respondent ignores the fact that, whatever may have been the internal thinking of the court in *Powell*, if it was not published – and none of Morrisette's *sub silentio* theory was published – it was not available for review by the practicing Bar and certainly was not known to Morrisette's trial counsel.

The issue of what Morrisette's trial counsel *did* know is the only germane question. His counsel knew that the Virginia Code addressed the mandatory form to use for verdicts in the penalty phase of a capital murder trial. They knew that the verdict form had been approved by both the Virginia Supreme Court and by this Court. They knew that published decisions of the Virginia Supreme Court upholding the statutory forms had not been overruled expressly. They knew, according to their affidavits filed below, that *Powell v. Warden* had been published. If they read it within the two months before Morrisette's trial – there is no evidence on this point – they knew that *Powell* contained an obviously advisory opinion which questioned the use of the verdict forms used in Powell's case but failed to clarify exactly what those objectionable forms contained or to describe precisely the court's objection. One of Morrisette's attorneys personally was aware that the Virginia Supreme Court had found error in the *failure* to use the statutory form in *Atkins*, his own case.

Consequently, in a case where there was any doubt about what form to use, attorneys acting reasonably would have opted to use – as they did in Morrisette's case – the forms mandated by Virginia law in the Code of Virginia. The Virginia Supreme Court's later proclamation in Morrisette's habeas case that a Sixth Amendment